amount to duress.[16] And this is in line with the policy of the law to examine carefully all transactions where aged and feeble minded people are involved.[17] Some cases similar to the principal case have been worked out on the basis of a dilemma, to the effect that if the proceedings were not well grounded, and so brought without right, they amounted to duress, while if B actually was *non compos,* the deed was voidable for that reason.[18] But the soundest way, it is submitted, to explain such cases, is on the ground that the doctrine of duress is still in process of development, and that the prevailing notions of what constitutes equitable and decent conduct furnish the basis for the legal definition of duress.

INHERENT "EQUITABLE" POWERS OF LAW COURTS.—An interesting question was presented in *Williams* v. *Miller* (D. C., W. D., Va. 1918) 249 Fed. 495, and a decision reached by an ingenious line of argument. The decision and reasoning on which it was based were affirmed in *Miller* v. *Williams* (C. C. A., 4th Cir. 1919) 258 Fed. 216. A recovered judgment against B, a citizen of West Virginia, on the law side of the Federal District Court of West Virginia. Because of fraud practiced by B, A gave him a release of the judgment, which release was recorded in the Clerk's office of the court in which the judgment was rendered.[1] Later A discovered that B had property in Virginia, wished to attach the same, and having served the defendant in that state, brought an action on the equity side in the Federal District Court of Virginia to cancel the release and subject B's Virginia land to A's original claim. B relied on § 723 of the Revised Statutes,[2] which provides: "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law." His contention thereunder was that A could have procured the West Virginia law court to cancel the entry of satisfaction because of the jurisdiction of that court over its own records and that failure to pursue this procedure deprived B of a right of trial by jury. The court admitted that an application to the West Virginia law court was possible, but pointed out that the law court's action in this matter would have been but the exercise of an inherent "equitable power", and since the question could have been brought on by motion, no jury trial of the issue could therefore have been demanded. The court concluded that it would be a foolish thing to send B from an equity court to a law court to procure equitable relief, and granted the plaintiff the desired decree.

It is undoubtedly true today that a court of law will entertain a

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[16]Parker *v.* Hill (1908) 85 Ark. 363, 108 S. W. 208; Foote *v.* De Poy (1905) 126 Iowa 366, 102 N. W. 112. But there is no duress where a threat to have a guardian appointed is properly used. Lawrence *v.* Morris, *supra,* footnote 11.

[17]Blackford *v.* Christian (1829) 1 Knapp 73, 77; Shakespeare *v.* Markham (1878) 72 N. Y. 400, 403.

[18]Cummings *v.* Ince (1847) 11 Q. B. *112; see Foote *v.* De Poy, *supra,* footnote 16.

[1]Ross *v.* Miller (C. C. A. 1918) 252 Fed. 697.

[2]36 Stat. 1163, U. S. Comp. Stat. (1916) § 1244.

motion to cancel a mistaken or fraudulent entry of satisfaction,[3] and the power of the court thus to act has been ascribed to its control over its records.[4] It is true that the plaintiff may be required to release the defendant to the extent of the amount he has paid[5] or that the judgment may be declared reinstated to the extent of the amount unpaid.[6] The order of the court sometimes directs the clerk to remove the satisfaction piece from the files,[7] and sometimes contains an order vacating the satisfaction and causing the clerk to annex a copy of the rule to the record.[8] Now and again, however, loose talk is indulged in to the effect that the law court, in using its power as above indicated, is exercising what is termed an "equitable jurisdiction" assumed by courts of law.[9]

For what reasons can this jurisdiction of the law court be deemed "equitable"? When the court speaks of "inherent equitable jurisdiction" it seems that it must mean one of two things: either that courts of law took over this form of relief from courts of equity, or that it has characteristics so common to equitable actions and rare in actions at law as to stamp it as inherently "equitable" in nature.

To consider this last first: the fact that the order may be directed to a person to do a thing gives no basis for identifying it with an equitable decree, since it does not order the defendant to do something, but announces the fact of cancellation and directs the clerk of the court, a ministerial officer, in pursuance thereof to change the record.[10] The failure unconditionally to vacate the record of satisfaction where the defendant has already paid part does not stamp the proceeding indubitably as equitable, merely because of a common-sense requirement. This brings us to the point of considering whether the procedural form of motion is a sure indication of the equitable nature of the relief sought. Obviously it is not.

In addition, the history of the power of the court to give relief in the case of a fraudulently entered judgment or satisfaction will, it is believed, point to an origin quite definite and founded not in equity but in law. In the principal case the plaintiff sought to escape the effect of the release and enjoy the judgment. It will be illuminating to consider the reverse of this situation, *viz.*: where the defendant wished to vacate a judgment and enter up satisfaction where he had been discharged by the giving of the release after the judgment. Here the defendant applied for a writ of *audita querela,* said by Blackstone

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[3]Keogh *v.* Delaney (1878) 40 N. J. L. 97; Fuller *v.* Baker (1874) 48 Cal. 632; Cohen *v.* Camp (1870) 46 Mo. 179; but see Henley *v.* Hastings (1853) 3 Cal. *341.

[4]Ackerman *v.* Ackerman (1882) 44 N. J. L. 173; Murphy *v.* Flood (Pa. 1853) 2 Grant *411; see Wilson *v.* Stilwell (1863) 14 Oh. St. 464, 468.

[5]Faughnan *v.* City of Elizabeth (1895) 58 N. J. L. 309, 33 Atl. 212; see Lee *v.* Vacuum Oil Co. (1891) 126 N. Y. 579, 27 N. E. 1018.

[6]Haggin *v.* Clark (1882) 61 Cal. 1.

[7]McGregor *v.* Comstock (1863) 28 N. Y. 237.

[8]Wardell *v.* Eden (N. Y. 1800) 2 Johns. 121, 126, *aff'd.* (1801) 2 Johns. 258.

[9]See Laughlin *v.* Fairbanks (1844) 8 Mo. 367, 372.

[10]Wardell *v.* Eden, *supra,* footnote 8; McGregor *v.* Comstock, *supra,* footnote 5.

to be "in the nature of a bill in equity",[11] but also classified as one of the "proceedings in the nature of appeals from the proceedings of the King's courts of law".[12] This description of the writ as being "in the nature of a bill in equity" seems merely a way of saying that the relief resembles that which a court of equity might give, and obviously does not deny that the writ is issued by a law court. Later (it is not clear at just what time) the defendant was granted relief on motion "in cases of evident oppression",[13] and subsequently the practice freely to give relief on motion in similar cases became well recognized.[14] But a distinction was made in those cases in which the parties' affidavits were contradictory. Where there was no doubt as to any issue of fact, the motion was entertained. But where material facts were controverted, the court, disinclined to resolve the difficulty, adopted various expedients to escape this task. The defendant might be told to bring his *audita querela*,[15] or an action at law,[16] or the parties might be directed to frame issues; [17] and in one case an application to equity was advised, although the court expressly affirmed its jurisdiction to grant relief.[18] Where a release was pleaded by the judgment debtor, it was thought eminently necessary to put him to his *audita querela*.[19]

A like procedure has been followed where the plaintiff has on motion sought relief similar to that asked in the principal case. Where there was no conflict of evidence the plaintiff's motion was granted, as has been pointed out above.[20] Where the plaintiff in effect asked to have a release set aside because of fraud, which was denied by the defendant, the defendant was put to his *audita querela*.[21] Later cases, in which

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[11]3 Bl. Comm. *405.

[12]3 Bl. Comm. *402.

[13]Anon. (1700) 1 Salk. 93, note a; 3 Bl. Comm. *406.

[14]Potter *v.* Hunt (1888) 68 Mich. 242, 36 N. W. 58; Everitt *v.* Knapp (N. Y. 1810) 6 Johns. 331; see Parker *v.* Judge of Calhoun Circuit (1872) 24 Mich. 408; Spafford *v.* City of Janesville (1862) 15 Wis. *474, 478. *Cf.* Stroheim *v.* Deimel (C. C. 1896) 73 Fed. 430. This case was reversed on appeal, Stroheim *v.* Deimel (C. C. A. 1897) 77 Fed. 802, on the grounds that the plaintiff had failed to make out a cause of action. The court seems to have admitted the propriety of the defendant's seeking his relief by motion, but intimated at p. 805, that *audita querela* would have been the better practice.

[15]See Wicket *v.* Creamer (1699) 1 Salk. *264.

[16]Hooper *v.* Smith (1889) 74 Wis. 530, 43 N. W. 556; Lister *v.* Mundell (1799) 1 Bos. & Pul. 427.

[17]Cooley *v.* Gregory (1862) 16 Wis. *303; Horner & McCann *v.* Hower (1861) 39 Pa. 126.

[18]Lansing *v.* Orcott (N. Y. 1819) 16 Johns. 4.

[19]In Wardell *v.* Eden, *supra*, footnote 8, Kent, J., at p. 262, said: "But, as Lord Holt observed, (1 Ld. Ray. 439, 445. 1 Salk. 264) if the ground of the application be a release, or other matter of fact, it is reasonable to put the party to his *audita querela*, because the plaintiff may deny it; and if he deny it, the court will not relieve upon motion."

[20]*Supra*, footnote 3.

[21]Baker *v.* Ridgway (1824) 2 Bing. 41. In this case, the plaintiff, induced by the fraud of the defendant, who had been taken in custody for debt, released the defendant but subsequently retook him. The defendant

material facts were put in issue, dismissed the motion and ordered an action to be brought,[22] directed the framing of issues[23] or sent the case to equity.[24]

In view therefore of the fact that the granting of relief to a defendant by vacation of a judgment and entering satisfaction, and, as it is believed, the opposite relief accorded a plaintiff, had a distinctly legal origin, it is submitted that the power of the law court to act in such cases arose not from any inherent "equitable jurisdiction", but is on the contrary primarily a legal power. It is not true historically that to deny the plaintiff relief in equity in *Williams* v. *Miller* would be to send him to law for "equitable" relief, nor is it true, as has been seen, in the sense that the relief is characteristically "equitable". It is true that equity has not hesitated, in recent years at any rate, to assume original jurisdiction and grant relief in similar cases.[25] But since courts of law also have jurisdiction, it would seem to be simpler and more convenient to say frankly that when equity grants such relief, equitable jurisdiction is exercised, and that when the law gives similar relief, it is in the exercise of a legal jurisdiction.[26]

Thus the decision of the court in the instant case, in so far as it was based on the theory of inherent "equitable jurisdiction" of the courts of law, would seem to have been faulty. But it is believed that the decision can be sustained on other grounds, for, as has been pointed out above, equity can assume original jurisdiction in this class of cases,[27] and § 723 would seem to be inapplicable. For it was admitted that the purpose of this section was to preserve to the defendant his right of trial by jury, and prerequisites to his right here were: the existence of a set of facts capable of conflicting interpretations, and the opinion of the judge that there was sufficient contradiction. Section 723 was not intended to preserve a mere contingent right.[28]

It only remains to consider whether equity, having jurisdiction, could issue an effective decree. It is conceded that the court here could have no physical control over the record in the sister state.[29] The effect that would be given to its decree in West Virginia may

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moved that he be discharged from custody and satisfaction entered on the record. The plaintiff contended that the fraud had rendered the previous release nugatory, which is essentially the same as asking for a cancellation of a written release. He was met by affidavits denying the fraud. The court refused to pass on this question, and put the defendant to his *audita querela.*

[22]See Chapman *v.* Blakeman (1884) 31 Kan. 684, 3 Pac. 277; Fox *v.* State (1901) 63 Neb. 185, 186, 88 N. W. 176.

[23]McDonald *v.* Falvey (1864) 18 Wis. *571; see Watts & Joyner *v.* Norton (Ga. 1831) R. M. Charlton 353.

[24]Barrett *v.* Lingle (1889) 33 Ill. App. 650; but see Martin *v.* Bank of the State (1859) 20 Ark. *636.

[25]Stuart *v.* Peay (1860) 21 Ark. *117; see Kerr *v.* Kerr (1898) 81 Ill App. 35; Moore *v.* Cairo & Fulton R. R. (1880) 36 Ark. 262, 268.

[26]30 Harvard Law Rev. 449, 460.

[27]*Supra,* footnote 24.

[28]As was suggested in the principal case, if the plaintiff had sued on the judgment in West Virginia, and the defence had been a plea of the release, an issue properly triable by jury would have been raised by a replication setting up fraud. But, of course, the plaintiff could not have been compelled to proceed in this manner, but might have proceeded by motion.

[29]Burney *v.* Hunter (1889) 32 Ill. App. 441.

perhaps be doubtful and need not be considered here, but it seems clear that the decree would operate in Virginia to render the release nugatory as far as Virginia is concerned, and to give to the judgment, in the latter state, the same legal effect as though the release had never been given.[30]

SPECIFIC INTENT IN THE ACQUISITION OF DOMICIL.—The acquisition of a so-called "domicil of choice" involves, in addition to capacity[1] to acquire a new domicil by one's own acts, the existence of two elements, one physical, the other mental. The former is commonly stated to consist of actual presence, at least for a moment, in the locality in question; the latter is variously described—"an intention to remain permanently",[2] or "for an indefinite time . . . or at least for an unlimited or indefinite time, without any definite intention of ultimate removal",[3] or "with a present intention of making it [the locality] his home, unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home".[4] It will be noted that in all the foregoing extracts the intention as described has no reference to law or legal consequences, but merely has to do with the mental attitude of the person concerned with reference to the duration of his physical connection with the place in question.

Occasionally, however, we find a different form of statement, *e. g.*, "an intention to abandon the former *domicile,* and acquire another as the sole *domicile*".[5] Is "domicile" here used merely in its popular sense as a synonym for "home", or is it a word of art, a technical legal term? If the latter, we have the question raised, whether there are any circumstances under which a specific intention as to domicil, *i. e.*, a state of mind which has reference to the legal consequences which that word connotes, is of importance in determining where the person in question is domiciled in the legal sense. Obviously, the problem can only arise when a person has two or more residences and maintains such physical relations with them that he may conceivably be domiciled in either. Here usually the inquiry resolves itself into the question: Which did he regard as his "permanent home", or "headquarters"? Suppose, however, that, being informed of the legal meaning of the term domicil, his intention is specifically directed to the choice of a domicil—is a specific intent of this kind the decisive factor in determining his domicil?

Curiously enough, there is almost no clear-cut discussion of the question by courts or text writers. When analyzed, this specific intent as to domicil seems to come to this, that the person in question desired

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[30]Darrow *v.* Darrow (1876) 43 Iowa 411. *Cf.* Dobson *v.* Pearce (1854) 12 N. Y. 156. In this case, a judgment creditor was restrained by equity in Connecticut from suing on a fraudulently obtained New York judgment. When the defendant was later sued in New York on the judgment, it was held that the Connecticut decree was a good defence. *A fortiori,* would it have been a good defence in Connecticut to a proceeding begun after the equitable decree and based on the judgment?

[1]"Capacity" signifies here the existence of certain facts—the requisite age, mental ability, *etc.*

[2]Minor, Conflict of Laws, § 56.

[3]Minor, *op. cit.* § 61.

[4]Depue, J., in Harral *v.* Harral (1884) 38 N. J. Eq. 279.

[5]Rapallo, J., in Dupuy *v.* Wurz (1873) 55 N. Y. 556. Italics are those of the present writer.